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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 201

FRANK KUCHIN, *Petitioner,*

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner, Frank Kuchin, having recovered a jury's verdict and judgment of the United States District Court for the Northern District of Illinois in the sum of $37,500 on account of personal injuries that he sustained when he was struck by a protruding bar from defendant's railroad train while he was upon its right of way in a public street, having suffered reversal without remandment of that judgment and asserting that the Court of Appeals has so clearly evinced in this and many similar negligence cases a misconception of the functions of a Federal court of re-

view in such cases "as to call for an exercise of this Court's power of supervision," respectfully seeks this Court's writ of *certiorari* to review and reverse the judgment of the Court of Appeals for the Seventh Circuit in this case.

REFERENCE TO THE OPINIONS BELOW

The opinion of the Court of Appeals appears under the title *Kuchin* v. *Chicago and N.W. Ry. Co.*, 210 F. (2) 863 to 868. It is reprinted in full in the record at pages 202 through 209, inclusive.

The District Court rendered no written or oral opinion.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals was entered on January 12, 1954.

Petition for rehearing was denied on March 25, 1954.

The transcript of record was filed and the docket fee was paid within ninety days from March 25, 1954. This Court, through Mr. Chief Justice Warren, has enlarged the time for filing this petition to and including July 10, 1954, by order entered June 21, 1954. Hence this petition is timely.

This Court has jurisdiction to review the judgment in question under Section 1254 of the Judicial Code (Title 28, U.S.C.A., Sec. 1254).

THE QUESTION PRESENTED

The question presented is:

> The Court of Appeals accepted the jury's finding that the plaintiff, a pedestrian licensee in the defendant's right of way on a public thoroughfare, was struck by a protruding drawbar and seriously injured. It held, however, that the jury could not infer from the evidence summarized in the Statement of the Case that reasonable inspection would have prevented the plain-

tiff's injury and therefore set aside the jury's verdict without remandment. Does this holding, in the light of the evidence in this case and in the light of many other recent decisions of that Court in negligence cases, evince so basic a misconception of the functions of Federal appellate judicature as to elicit *certiorari* and evoke reversal?

STATEMENT OF THE CASE

Petitioner filed his complaint in the Circuit Court of Lake County, Illinois, seeking damages as the result of injuries sustained by him on May 30, 1951 (R. 1-2).

The defendant removed the cause to the United States District Court for the Northern District, Eastern Division, Illinois, on the sole basis of the diversity of citizenship between the parties and the presence of the requisite jurisdictional amount (R. 2, 3).

Trial before a jury was had. There was a verdict and judgment for $37,500.00 (R. 129-131). The jury returned two special interrogatories finding:

1. That the defendant negligently struck the plaintiff with an iron bar. (R. 130.)

2. That the plaintiff exercised ordinary care and caution for his own safety under the conditions shown by the evidence to have existed immediately prior to and at the time of the occurrence in question. (R. 130.)

The motions of defendant to enter judgment notwithstanding the verdict, in the alternative to set aside the jury's verdict and answer to the two special interrogatories, or, in the alternative to require a remittitur, were denied (R. 132). The Court of Appeals held that there was no evidence of negligence and reversed the judgment (*Opinion*, R. 204 to 208).

In narrating the evidence in the case, we shall confine ourselves so far as possible to the language of the opinion

of the Court of Appeals and all statements in quotations are from that opinion unless the contrary is indicated:

"The mishap occurred in Waukegan, Illinois, during the daylight hours on May 30, 1951. At the place involved the defendant's track runs in a northerly and southerly direction on property owned by the City of Waukegan known as Union Street. Though once dedicated to public use, and never vacated, the City Council in 1891 did grant to the Chicago and North Western and another railway company 'the right to lay down, maintain and operate in perpetuity two railroad tracks with necessary turnouts, side tracks and switches along and upon the westerly twenty four feet' of Union Street. This area is consequently not in fact used for public vehicular traffic. However, a cinder foot path, used for many years by the general public, is located roughly parallel to the defendant's track and about two feet from the east rail.

"The plaintiff, a man 66 years of age and in good health at the time, was walking south along the path just prior to the accident. The defendant's train, which consisted of ten box cars pushed by a diesel engine, approached the plaintiff from the rear as it proceeded in the same direction. The train had been made up in the defendant's Waukegan yard, which is north of the scene of the accident, and the cars were being shoved to a wire mill located about a mile and a quarter to the south.

"In response to a whistle the plaintiff looked around and first saw the train when it was about a block away. It was approaching at about ten miles an hour. The plaintiff then moved a foot or a foot and a half off the path to the east and onto the grass. He continued walking along the grass in this manner, and in a short time the lead end of the train overtook him. As the train was passing him his right arm was about two feet away from the sides of the moving cars. Suddenly, according to the plaintiff, after six or seven cars had passed, something hit him in the back at a point just below the right shoulder blade. This caused him to fall and his right leg was thrown across the rail and run over by the wheels of a freight car.

"The plaintiff, although he had looked back at the train as it approached him, did not then see any protruding object. However, just as he fell, or immediately afterwards, he looked up and saw a 'piece of iron sticking out from somewhere.' He did not particularly identify this object, but it appeared to be 'a piece of bar or pipe, piece of rod or pipe, or something like that.' The plaintiff said that it stuck out from the side of the train about two feet, that it was an inch thick, dark in color, and extended from a point four and a half or five feet above the ground. He did not notice whether it had a handle." (R. 202-3.)

An inspection of the car the next day showed that

"a draft key was missing from one of the cars, but other than that no irregularity in any of the equipment was ever detected. However, at the trial there was introduced on the plaintiff's behalf evidence tending to show that a bleeder rod, which in appearance would correspond roughly to the object which the plaintiff described, may sometimes become disconnected and extend laterally from the side of a car." (R. 204.)

After stating that the evidence was uncontradicted that

"a draft key is not essential to the proper functioning of the coupler, and that its absence would not cause any other piece of the coupling machinery or equipment to project beyond the side of the car," (R. 204-5.)

and that it was error in submitting any issue to the jury arising out of the fact that a draft key was missing, the Court of Appeals continued:

"The plaintiff seems to rely principally on the theory that the object which struck him was a bleeder rod projecting from the side of one of the cars. This device is an iron rod about three-eighths of an inch in diameter. It is part of the air brake equipment, and it is connected by a cotter pin to a bleeder valve on the reservoir tank located beneath the car. It extends transversely from the tank to a point beneath the outside edge of the car, where it is supported by an eye bolt. The outer end of the bleeder rod is curved down

to form a handle. When in normal position the handle of the rod does not extend beyond the outside edge of the car.

"The plaintiff's expert witness, O'Hara, testified that in his experience as a railroad switchman it was a common thing to see bleeder rods that had become disconnected from the valve of the reservoir tank. He stated that this would permit the rod to slide through the eye bolt and project laterally beyond the outside of the car by as much as its own length. He explained that this may occur when the cotter pin which fastens the rod to the bleeder valve is broken or wears out because of vibration, rust, or natural deterioration. The witness further testified that this cotter pin normally will last for a year. He stated that a specific inspection of the cotter pin is necessary to determine whether it is in danger of coming loose. He said that such inspections are made at least once a year by the car department and that between such inspections there might be a defect in the cotter pin which a train crew could not determine.

"It is the plaintiff's contention that the jury here could infer that a bleeder rod on one of the cars had come loose, that it then protruded beyond the side of the car, and that it struck the plaintiff. We assume this to be the fact. Having done so, however, we are yet impelled to hold that there is nothing in the record from which the jury could properly find negligence on the part of the railroad." (R. 205-206).

The essence of the holding of the Court of Appeals is expressed in the following two paragraphs:

"We need not consider whether the plaintiff here could properly invoke the doctrine of *res ipsa loquitur*. He has not only introduced expert testimony tending to show the precise cause of the injury, which precludes the application of that doctrine, see *Omaha Packing Co.* v. *Pittsburgh F.W. & Ry. Co.*, 7 Cir., 120 F. 2d 594, but he has also expressly declined to rely on that doctrine. Therefore, it is not sufficient, to make a prima facie case, for the plaintiff merely to show that he was struck by a bleeder rod extending laterally from one of the defendant's cars. It was

incumbent upon the plaintiff to introduce further evidence from which the jury might reasonably have inferred that responsibility for this condition lay in the defendant's negligence.

"We have assumed that from the testimony of O'Hara and from other evidence the jury could infer that the plaintiff was struck by a bleeder rod which had become disconnected by reason of a defective cotter pin. The jury could also infer that a specific inspection of the cotter pin is necessary to ascertain its condition. Finally, it could infer that the pin normally will last for about a year. But we are at a loss to see how, from these premises, the jury in this case could properly conclude that the defendant was guilty of actionable negligence. The plaintiff introduced no evidence whatever relating to the care exercised by the defendant to keep the machinery in good order. There is not the slightest indication of the frequency with which routine inspections were made, or of how long before the mishap this equipment was last inspected. (We note that O'Hara, who stated that inspections of air brakes 'are made at least once a year,' necessarily spoke from his experience as an employee of the Chicago Great Western railroad which, so far as the record shows, has no connection whatever with the defendant in this case.) Nothing, in short, appears from which it might be inferred that the defendant knew or reasonably should have known that the cotter pin was defective. Under the circumstances, evidence relating to these matters was indispensable to entitle the plaintiff to submission of the question of negligence to the jury." (R. 206-7.)

The Court of Appeals did not advert to the following testimony in the record:

"The car was bad order in the yard before the inspection. The car was being used at the time of the occurrence. Bad order conveys the idea that the car should be fixed. When a car is bad order, you take it out of the train and pull it out of service." (R. 77.)

It will be observed that the core of the holding of the Court of Appeals is in this language:

> "There is not the slightest indication of the frequency with which routine inspections were made, or of how long before the mishap this equipment was last inspected. . . . Under the circumstances, evidence relating to these matters was indispensable to entitle the plaintiff to submission of the question of negligence to the jury." (R. 207).

But evidence "of the frequency with which routine inspections were made, or of how long before the mishap this equipment was last inspected", *was evidence exclusively within the possession of the respondent.* It being conceded that protrusion of bleeder rods may occur when "the bleeder valve is broken or wears out because of vibration, rust, or natural deterioration" and that these defects are discernible upon inspection, petitioner contended below and contends here that the jury might properly infer from the absence of evidence forthcoming from respondent that no adequate inspection had been made. Rejection of this contention by the Court of Appeals raises, we submit, a most important question as to burden of proof in negligence cases tried in Federal courts.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT AND ARGUMENT AMPLIFYING THOSE REASONS

Mindful that this Court almost never grants writs of *certiorari* unless the case presents questions of exceptional moment to the national jurisprudence, we respectfully suggest the following considerations as demonstrating that the importance of this case far transcends that of the interests of the immediate parties litigant therein:

The authors of this brief have made a statistical canvass of cases involving personal injury and death decided by the Court of Appeals for the Seventh Circuit from January of 1950 through those reported in Volume 197 of the Federal Reporter, Second Series.

In twenty-six of these cases, the Court of Appeals has reversed judgments for plaintiffs upon the theory that there was not sufficient evidence of negligence to take the

case to the jury. These cases are: *Cox* v. *Kroger*, 179 F. 2d 382; *Swigart* v. *C. & N. W. Ry. Co.*, 180 F. 2d 177; *Hoff* v. *Donaldson*, 184 F. 2d 419; *Wendell* v. *C., R.I. & P. R.R. Co.*, 184 F. 2d 868; *Billman* v. *Kroger*, 185 F. 2d 120; *O'Keefe* v. *Wabash R.R. Co.*, 185 F. 2d 241; *Reynolds* v. *B. & O. R.R. Co.*, 185 F. 2d 27; *Heller* v. *Select Lake City Theater Co.*, 187 F. 2d 649; *Hill* v. *Railway Express Agency*, 187 F. 2d 184; *Desper* v. *Starved Rock Ferry Co.*, 188 F. 2d 177; *Quirk* v. *N.Y., Chicago. & St. L. Ry. Co.*, 189 F. 2d 97; *Ackermann* v. *Hicks*, 193 F. 2d 345; *Ernst* v. *Jewel Tea Co.*, 197 F. 2d 88; *McGunegill* v. *C. & O. R.R. Co.*, 199 F. 2d 302; *Guffey* v. *Havey*, 201 F. 2d 501; *Reilly* v. *C. & N.W. Ry Co.*, 201 F. 2d 473; *Spikings* v. *Wabash Ry. Co.*, 201 F. 2d 492; *Fiedler* v. *C. & N.W. Ry. Co.*, 204 F. 2d 515; *Schroeder* v. *Minneapolis, St. P. & S.S. M. R.R. Co.*, 204 F. 2d 758; *Wetherbee* v. *E. J. & E. Railroad Co.*, 204 F. 2d 755; *Petermichl* v. *C. & N.W. R.R. Co.*, 205 F. 2d 434; *Repshodt* v. *United States*, 205 F. 2d 852; *Barrett* v. *C. & N.W. Ry. Co.*, 207 F. 2d 5; *Wadiak* v. *Illinois Central R.R. Co.*, 208 F. 2d 925; *Koch* v. *C. & N.W. Ry. Co.*, 208 F. 2d 152; *Stevens* v. *Sears Roebuck Co.*, 211 F. 2d 260.

We have found only four cases in which judgments for plaintiffs were affirmed. These cases are *Fritz* v. *Penn. R.R. Co.*, 185 F. 2d 31, *O'Donnell* v. *E. J. & E. Railroad Co.*, 193 F. 2d 349. *Sivert* v. *Penn. R.R. Co.*, 197 F. 2d 371 and *Nattens* v. *Grolier Society*, 195 F. 2d 449.

In one of these cases, *Wetherbee* v. *E. J. & E. R.R. Co.*, 191 F. 2d 302, where the judgment under the Federal Employers' Liability Act was $50,000 for the death of a man 40 years old, with a life expectancy of 28.18 years and present value of further earnings would be $88,650.00, who left a widow and four children, the court thus expressed its attitude toward what it deemed high verdicts in personal injury cases:

> "The way the amounts awarded in verdicts in personal injury cases have been rapidly increasing is a matter of concern to all who are interested in a fair and orderly administration of justice. If the amounts

awarded in the next decade keep pace with the rate at which they increased in the last decade, in certain areas at least, verdicts of $150,000, $200,000, $250,000 or even greater sums may be expected. Even allowing for the decreased purchasing power of the dollar, many of the recent large awards for damages are not justified." (p. 309.)

In Illinois, courts of review manifest a different attitude. In *Smith* v. *I. C. R.R. Co.*, 343 Ill. App. 593, 99 N.E. 2d 717, the appellate court affirmed a judgment of $185,000 for personal injuries. Leave to appeal was denied.

Indeed, as far back as 1926, a judgment of $75,000 was affirmed in *Princell* v. *Pickwick Grayhound Lines*, 262 Ill. App. 298. Likewise, see *Schneiderman* v. *Interstate*, 331 Ill. App. 143, 72 N.E. 2d 705, wherein a verdict for $100,000 was affirmed.

Indeed, in the State courts settlements are made for substantial sums. Thus, in *Martinez* v. *Chicago & N.W. Ry. Co.*, Superior Court of Cook County, No. 51S-9284, wherein a 43 year old section laborer lost both legs well up to his hip joints, the case was settled, after seven days of trial, for $145,000.

Other circuits, following this Court's pronouncement as to the function of the jury in negligence cases in *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, manifest a different attitude toward the jury's function in personal injury cases. Cf. *Kieffer* v. *Blue Seal Chemical Co.*, 107 F. Supp. 288, affirmed 196 F. 2d 614, in which the Second circuit sustained a verdict in the sum of $250,000.

In *Zermani* v. *N.Y., N. Haven & Hartford R.R. Co.*, 200 F. 2d 240, the Court of Appeals for the First Circuit affirmed a verdict for $141,500 in a death case under the Federal Employers' Liability Act.

But in *Flener* v. *L. & N. R.R. Co.*, 198 F. 2d 77, where a plaintiff obtained a verdict of $7500 for a fractured vertebra, loss of three teeth, five months' hospitalization, months in a plaster cast and brace and commitment to a state hospital for the mentally ill for a period of five

months, the Court of Appeals for the Seventh Circuit refused to set aside the verdict as inadequate although the contention made was not that the Court of Appeals should weigh the evidence but prejudicial misconduct on the part of counsel trying the case below.

Turning to the four cases in which the Court of Appeals for the Seventh Circuit has affirmed verdicts for the plaintiffs in the last four years, it should be noted that in one of those cases, *O'Donnell* v. *E. J. & E. R.R. Co.*, 193 F. 2d 349, this Court reversed the original judgment in the Seventh Circuit and upon remand, the judgment was affirmed with expressions of reluctance.

Lawyers and district judges in the Seventh Circuit are unable to reconcile the tenor and trend of the decisions of the Court of Appeals for the Seventh Circuit with those for other Federal circuits and the State courts. Plaintiffs stand far less chance of sustaining a verdict and judgment in that court than in other courts.

We earnestly submit that the foregoing statistical considerations show the Court of Appeals to be prepossessed by a fundamental misconception of the function of Federal courts of review in personal injury cases tried by a jury.

The instant case is a vivid illustration of that misconception.

The facts in the instant case are extremely simple and may thus be distilled to their essence in a short paragraph:

> The plaintiff, a pedestrian licensee traversing the defendant's right of way in a public thoroughfare, was struck by a protruding bleeder rod and seriously injured. It is the custom elsewhere than on the defendant's railroad to inspect bleeder rods and the mechanism appurtenant to them at least once a year. Properly adjusted bleeder rods do not protrude from cars but it is common for improperly adjusted bleeder rods so to protrude.

From these facts the jury inferred negligence. That inference was the simple and logical conclusion that if inspection will disclose defects in the appurtenances to bleeder rods and if defective bleeder rod protrudes and strikes a person, negligence inheres in the failure to exercise reasonable inspection and discernment of the defect.

The Court of Appeals intimates that had the plaintiff relied upon the maximum of *res ipsa loquitur* he might have recovered. But the opinion says that because he disclaimed reliance upon that Latin phrase and introduced expert testimony as to how bleeder rods operated when inspected and how they were likely to operate when not inspected, he "waived" any right to recover under the doctrine of *res ipsa loquitur*.

In the first place, this is not the Illinois law. In the second place, even if it were the Illinois law, the maxim of *res ipsa loquitur* is at most a rule of evidence in the Federal courts, a plaintiff is entitled to recovery if his case meets the Federal standards of evidence or if it meets the State standards of evidence.

In *Lindroth* v. *Walgreen Company*, 407 Ill. 121, 94 N.E. 2d 847, the Illinois Supreme Court adopted the language of this Court in the classical case of *Lavender* v. *Kurn*, 327 U.S. 645. In the *Lindroth* case, the Illinois Supreme Court quoted the following passage from that case:

> " 'Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.' " (p. 133.)

A very similar factual situation is found in *Howard* v. *Chicago & Alton R. Co.*, 179 Ill. App. 380. There the Court held the following to constitute a fact issue, saying at page 384:

"Three important facts are fully established, namely, that appellee was seriously injured while attending to his duties as gate keeper; that he was injured by a blow pipe thrown from this engine or train of appellant, and that appellee had nothing whatever to do with the operation of either the engine or train."

Whether the prima facie case is rebutted becomes a question for the jury. See *I.C. R.R. Co.* v. *Bailey,* 222 Ill. 480, 70 N.E. 833, *Chicago City Ry.* v. *Pural,* 224 Ill. 324, 79 N.E. 686. Nor did the fact that the plaintiff introduced expert testimony or state that he was not relying upon *res ipsa loquitur* change the legal effect of this rule of evidence. The expert testimony involved had only to do with an explanation of the parts of a car and specifically those parts which protrude from the side of the car.

Indeed, the Illinois court has held that where the plaintiff's attempt to prove an allegation of specific negligence failed, but the evidence established the elements supporting the presumption of negligence under *res ipsa loquitur* in a charge of general negligence, a case would still go to the jury on a general negligence count. (*William Wrigley, Jr. Co.* v. *Standard Roofing Co.,* 325 Ill. App. 210, 59 N.E. 2d 510.)

The Court of Appeals relied upon *C. & E.I. R.R. Co.* v. *Reilly,* 212 Ill. 506, 72 N.E. 454, for support of its present opinion.

That case is not in point.

There the plaintiff was struck by a piece of timber from a loaded railroad car. The complaint charged that the car in question was negligently loaded and further that the car was operated in a dangerous condition, of which the defendant knew or ought to have known. The plaintiff introduced no evidence of negligent loading so that the first charge failed. There was likewise no evidence of knowledge to sustain the second charge of the position of the scantling.

In the instant case we are confronted with a part of the car itself, which is supposed to be inspected before it sets out on its run. That it was not inspected is demonstrated by the fact that it was bad order when it left the yard. As Chief Justice Marshall said long ago:

> "It is a general rule as expressly recognized by the courts, that the positive authority of a decision is co-extensive only with the facts upon which it is made." (Chief Justice Marshall in *Ogden* v. *Sanders*, 12 Wheat. 332.)

This opinion is demonstrative of what litigants in the Court of Appeals for the 7th Circuit experience. The Court consistently misapprehends the law of Illinois, as enunciated by the Supreme Court.

A most astonishing instance of the failure of the Court of Appeals for the Seventh Circuit to appreciate the principles of circumstantial evidence embodied in the doctrine of *res ipsa loquitur* occurs in that Court's very recent decision in *Wadiak* v. *Illinois Cent. R. Co.*, 208 F. 2d 925. In that case a railroad employee subject to the Federal Employers' Liability Act had been injured by the shifting of a load in a freight car. The Court said at page 928:

> "*If the doctrine of res ipsa loquitur is ever applicable to litigation arising under the Act*, it certainly can not be applied in this case, where the negligence, if any, may be chargeable to the loader or to any of the other carriers who handle the car." (Emphasis supplied.)

The mere fact that the Court of Appeals for the Seventh Circuit should intimate doubt as to whether the doctrine of *res ipsa loquitur* can "ever" be applicable to suits under the Federal Employers' Liability Act demonstrates completely that Court's entire misconception of the doctrine. The doctrine is simply the principle that where the means of the sole instrumentality that occasioned an injury is in the exclusive control of the defendant and where the injury would not have occurred had the instrumentality

been carefully inspected and operated, the defendant must reject the influence of negligence or suffer an inference of liability. Why this doctrine should not be applicable to cases under the Federal Employers' Liability Act, where the common law of negligence furnishes the basis of liability, we can not say or see. Incidentally, in the *Wadiak* case the Court overlooked the rule that it was the duty of the defendant to use reasonable care to furnish the plaintiff a safe place to work and that this duty was not discharged by failing to remedy dangerous conditions that might have been due to the negligence of others than the railroad itself when the conditions creating the hazard were obvious to the plaintiff's fellow workers, contributory negligence, if any, not being a defense under the Act.

The *Wadiak* case is important in the instant case because it demonstrates that unless this Court exercises its power of supervision, injured plaintiffs in the Seventh Circuit, whether they sue under State or Federal law, can not hope for the same measure of consideration as is received by litigants in other circuits and in State courts on questions of circumstantial evidence, in personal injury cases.

Further illustrative of the attitude of the Court of Appeals for the Seventh Circuit toward personal injury cases is to be found in *Tisneros* v. *Chicago and North Western Ry. Co.*, 197 F. 2d 466, where the Court of Appeals held a defective engine not "in use on the line" as a matter of law although it was detained only temporarily in a roundhouse before resuming a schedule run.

We submit that the Court of Appeals has committed in this case two errors of sufficient gravity to elicit *certiorari:*

The first of these errors consisted in a holding that a jury might not rationally find negligence from evidence (1) that bleeder rods defectively positioned because of rust, wear or other factors discernible on reasonable inspection frequently protrude beyond the side of the train, and (2) that reasonable inspection will disclose the defects causing this protrusion. This error demonstrates that the Court

of Appeals labors under a basic misapprehension as to the scope of appellate review in negligence cases tried by a jury. This error was compounded and magnified by the consideration that all of the evidence concerning the frequency, character and results of inspection of this bleeder rod in particular and of bleeder rods on the respondent's railroad in general was in the exclusive possession of the defendant. Yet the Court of Appeals reversed because the *plaintiff* did not produce this evidence.

The second of these errors is its holding that because the plaintiff did not invoke the rule of *res ipsa loquitur* by name, that rule, which is only a principle of circumstantial evidence, was "waived" and that therefore the plaintiff was not entitled to the benefit of inferences drawn from the physical facts as shown by the evidence and from the absence of evidence that was exclusively within the control of the respondent. This error likewise embodies a misconception of federal jurisprudence so basic as to call for review by this Court.

PRAYER FOR WRIT OF CERTIORARI

WHEREFORE, petitioner prays this Court's writ of *certiorari* to review and reverse the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

JAMES A. DOOLEY
Attorney for Petitioner.

July, 1954.

APPENDIX

Judgment of the United States Court of Appeals For the Seventh Circuit

And on the same day, to-wit: On the twelfth day of January, 1954, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 12, 1954.

Before:

Hon. J. Earl Major, Chief Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. H. Nathan Swaim, Circuit Judge.

No. 10942

Frank Kuchin, *Plaintiff-Appellee,*

vs.

Chicago and North Western Railway Company, *Defendant-Appellant*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is ordered and adjudged by this Court that the Judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs; and that this cause be, and the same is hereby, Remanded to the said District Court with instructions to enter Judgment for the defendant.

Office - Supreme Court, U. S.
FILED
AUG 11 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 201

FRANK KUCHIN,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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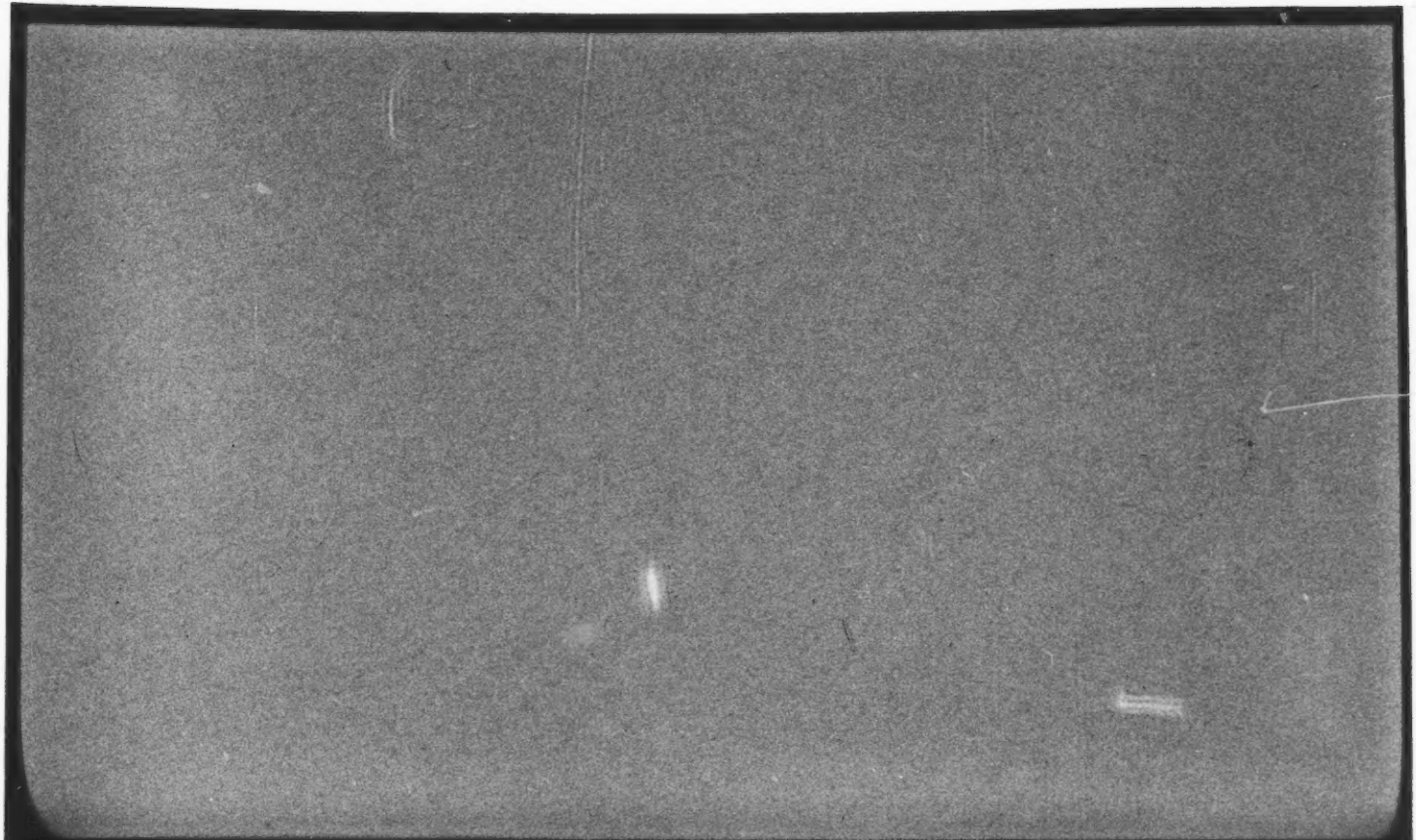

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EXHIBITS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No. 201

FRANK KUCHIN,

Petitioner,

VS.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Brief For Respondent in Opposition.

The petition contains the facts establishing this Court's jurisdiction and the citation to the only written opinion in this cause (Ptn. 2).

Questions Presented.

1. Under Illinois law, is a plaintiff entitled to recover damages for personal injuries merely by proving that as he walked beside a moving freight train he was struck by an unidentified iron rod protruding from the side of a box car?

It is well settled Illinois law that negligence may not be inferred from the mere fact that an accident occurred; facts evincing a lack of due care are required. Under the Illinois decisions, such facts are totally absent from this record.

2. Is the doctrine of *res ipsa loquitur* applicable where (a) the occurrence complained of is equally explicable on a hypothesis of pure accident, (b) where specific evidence of the cause of the accident has been introduced by petitioner, and (c) where the doctrine is relied on for the first time after an unfavorable decision of the Court of Appeals?

The applicable Illinois decisions prohibit the application of the doctrine of *res ipsa loquitur* to the facts in this case. The rules of appellate review prohibit asserting a new theory after a decision by the Court of Appeals.

3. Does the Court of Appeals for the Seventh Circuit misconceive the function of a federal reviewing court?

Neither the decision herein nor the collection of random and inaccurate citations contained in the petition indicate any such misconception.

Statement of the Case.

This case was determined below on the hypothesis that petitioner was struck by a loose bleeder rod protruding from the side of one of the cars of a train operated by respondent (R. 204-208). To assist in visualizing the situation, respondent has reproduced defendant's Exhibit 7 (R. 75) and a portion of defendant's Exhibit 16 (R. 112, 75) in Appendix B of this brief. Defendant's Exhibit 7, a photograph, shows the outside end and curved handle of a bleeder rod extending through an "I" bolt located below the side door of a box car. It will be noted that no part of this bleeder rod extends laterally as far as the outside of the track on which the car door rides. Defendant's Exhibit 16 is a blueprint showing the brake arrangement on a freight car similar to those in the train involved. The portion reproduced, called the crossbearer section, shows the part of the brake equipment under the center of the car, including the air brake pipes, the reservoir tank and the bleeder rods. Examination of this blueprint will show that the cotter keys by which the two bleeder rods are connected to the bleeder valve are located on top of the reservoir tank, just below the floor.

By means of selective reproduction of portions of the Court of Appeals' statement of facts, plaintiff conveys a surface impression of objectivity. However, a wholly different picture is conveyed by an examination of the entire opinion.

The language of the opinion omitted between the first and second quotations appearing on page 5 of the petition is as follows:

> "The plaintiff did not mention that he had been struck in the back until several days later and no person other than the plaintiff saw any object such

as he described, either before the accident or afterwards. Nothing of the sort was noticed by members of the crew when the train was being made up in the yards, nor by various persons, including the police, the yardmaster, and crew members, who gathered about the scene of the accident right after it happened. Nor was anything of the sort revealed by an inspection of the cars the next day."

In summarizing the holding of the Court of Appeals, petitioner elects to omit the following significant language, occuring directly after the long extract set forth on page 7 of the petition:

"The plaintiff makes the further contention that the projecting bleeder rod was plainly visible, and that, therefore, it should have been observed by members of the defendant's crew. The plaintiff said he first saw the rod 'sticking out' when the car from which it was projecting was six or seven car lengths south of the place where he was struck; that he 'saw it as soon as he got hit.' However, there is no indication as to how long the offending rod had been in that position. Neither is there any showing that members of the crew were so situated that they should have seen it irrespective of how long the condition had existed. No one would seriously contend that they were under an absolute duty to observe instantly every irregularity in the equipment regardless of its nature. To say that the train men should have seen the projecting rod and have avoided the accident, for no other reason than that the plaintiff saw it afterwards, is not a sufficient basis to support a reasonable inference of negligence."

Petitioner likewise passes over the following portion of the opinion of the Court of Appeals indicating that petitioner waived the application of the doctrine of *res ipsa loquitur:*

"We need not consider whether the plaintiff here could properly invoke the doctrine of *res ipsa loquitur.*

> He has not only introduced expert testimony tending to show the precise cause of the injury, which precludes the application of that doctrine, see *Omaha Packing Co.* v. *Pittsburgh F. W. & C. Ry. Co.*, 7 Cir., 120 F. 2d 594, *but he has also expressly declined to rely on that doctrine''* (emphasis supplied).

In implying some sinister significance to the failure of the Court of Appeals to refer to the testimony regarding a bad order car (Ptn. 7), petitioner neglects to call attention to the following testimony by his rebuttal witness, Drahos (R. 105-6):

> "The cars will couple properly without the draft key. The key can be gone and it won't interfere with pulling the car. I would not consider that as a safety appliance.
>
> "I had not bad-ordered the car in the train yard. Our records show that it had been marked bad-order. We send cars down to industries to be loaded and then when we get them back on the way to be unloaded we service them to keep from delaying the car. As to whether a car is pulled out of service when it is in bad order, it all depends on the kind of defect it is. If there is something that can't run it is tied up. If it is a penalty defect the car is taken out of service and repaired before it is switched any further."

The fact that a penalty defect was not involved is clear from the fact that on the trial petitioner abandoned the count of his complaint based upon the Safety Appliance Act (R. 121).

The statement at page 8 of the petition that evidence with respect to the inspection of these cars was in the exclusive possession of respondent is wholly unrealistic in view of the discovery provisions of the Federal Rules of Civil Procedure. Immediately following that statement petitioner comments on what may cause a bleeder rod to

protrude. Counsel ignores the testimony of his own expert, O'Hara, who testified as follows (R. 110):

> "When you pull on bleeder rods sometimes they come loose. They are only held to the bleeder valve with a cotter key. Vibration wears the key out. So does rust and natural deterioration. If you pull on it real hard you may break the cotter key. If you do, you pull the bleeder rod out as far as it will go. The cotter key is standard and I believe is specified by the Association of American Railroads. You cannot see the cotter key from the outside. You must look under the car. You are not able to tell the condition of the cotter key by making an inspection. As to whether there is any way to tell when the cotter pin is going to come loose, I would say that we make a specific inspection of it. I can order its inspection. These inspections are made periodically * * * It is possible that from once a year inspection there might be some vibration or wearing or something of the sort of the cotter key that nobody using a freight car could determine."

Summary of Argument.

The only issue for this Court is whether petitioner proved either a general or specific allegation of negligence that defendant carelessly struck plaintiff with an iron bar protruding from one of its cars. Because the determination of this issue is one of local law which would not justify certiorari, petitioner makes the charge that the Court of Appeals for the Seventh Circuit has misconceived its function.

Petitioner's argument that negligence could be inferred from failure to discover a defective cotter key ignores his own evidence that a defective cotter key cannot be discovered by routine inspection, that it may fail because of vibration, rust or wear, and that a cotter key is usually

good for about a year, thus requiring only annual inspections. The record is silent with respect to the practice of defendant in inspecting cotter keys. The only facts established are that the cars were given a routine inspection before they left the Waukegan yard and that petitioner was struck by a protruding bleeder rod. Under *Chicago & E. I. R. R. Co.* v. *Reilly*, 212 Ill. 506, 72 N.E. 454, this does not constitute a showing of negligence, since there is no evidence indicating lack of due care on the part of the respondent. Other authorities support this position.

Recognizing this failure of proof, plaintiff invokes the doctrine of *res ipsa loquitur* for the first time in this Court, despite his express refusal to rely upon it in the Court of Appeals. The applicability of the doctrine is a matter to be determined by state law in a diversity case; under the *Reilly* case and other Illinois authorities, the doctrine cannot be applied, since evidence was introduced to show the cause of the accident, and it is equally plausible that the cotter key might have snapped at some time between the time the train left the Waukegan yard and the time plaintiff was injured.

Petitioner contends that the Court of Appeals has misconceived its function in the review of personal injury cases. This contention is not a basis for certiorari, since the only fact relied upon to support it is petitioner's assertion that various cases decided by that circuit have resulted in reversals of favorable findings for plaintiffs. His statistical study is wholly inaccurate and his comparison with the attitude of Illinois courts wholly irrelevant.

Argument.

Should this Court grant the petition, the only issue which can be presented is whether petitioner proved the allegations of his complaint designated "(a)" and "(c)". Those allegations are as follows (R. 4):

> "(a) Carelessly and negligently operated its freight train in a southerly direction so that the same struck plaintiff;
>
> "(b) Carelessly and negligently failed to keep a proper lookout for persons walking along the aforesaid pathway;
>
> "(c) Carelessly and negligently struck the plaintiff with an iron bar which was then and there protruding from one of its cars as he was walking on the aforesaid pathway;
>
> "(d) Carelessly and negligently operated in its train of cars in service a car with a defective draft key."

Subparagraph "(b)" was withdrawn by order of the Court at the conclusion of all the evidence (R. 9). Under Rule 23(c) of this Court, petitioner has abandoned any claim with regard to subparagraph "(d)", since in his questions presented, he does not take issue with the finding of the Court of Appeals that the evidence "shows conclusively that a draft key, or the absence of one, could not, in any rationally conceivable manner, have been responsible for the plaintiff's injury."

Petitioner attacks the holding of the Court of Appeals with respect to the two remaining subparagraphs ["(a)" and "(c)"] on the basis that there was evidence from which negligence could be inferred, and that the doctrine of *res ipsa loquitur* was applicable. Since the jurisdiction of the United States District Court rested solely upon

diversity of citizenship (R. 1-3), these questions are matters of local law and will not, by themselves, elicit certiorari, *Propper* v. *Clark*, 337 U. S. 472, 486; *Hillsborough* v. *Cromwell*, 326 U. S. 620, 630; *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707-708. To avoid this result petitioner contends the Court of Appeals for the Seventh Circuit misconceives its function in the review of personal injury cases.

I.

Petitioner advances no logical reason for disturbing the holding of the Court of Appeals that petitioner failed to prove any actionable negligence.

Petitioner's obscure argument that facts existed from which negligence could be inferred appears to be that inspection will disclose defects in bleeder rod appurtenances and that properly adjusted rods do not protrude beyond the side of the car (Ptn. 11-12). Petitioner's counsel does not disagree with the conclusion of the Court of Appeals that there was no "absolute duty (on the part of the crew) to observe instantly every irregularity in the equipment regardless of its nature." He contends that the assumed bleeder rod defect should have been discoverable through the use of ordinary care, simply because inspection of the cars before they left the Waukegan yards revealed that a draft key was missing on IC 19435. Counsel appears to argue that since the inspection had revealed that a draft key was missing, it should also have shown a cotter key holding a bleeder rod was about to give out.

Petitioner cites no authority in support of his argument and it is completely at variance with his own evidence. Petitioner proved that bleeder rods will become

disconnected when the cotter keys connecting them to the tank wear out from vibration or rust. When this happens, a hard pull on the bleeder rod will break the connection. Plaintiff's witness, O'Hara, testified that a routine inspection will *not* tell whether a cotter key is about to give out, and that the customary precaution to avoid cotter key breakage is an annual inspection, such cotter keys being ordinarily good for at least a year (R. 110-111).

Petitioner made no effort to show that even the most minute inspection prior to the time the train left the Waukegan yard would have revealed that a cotter key was about to give out. The only inference which can be drawn from the fact that the crew members walking along each of the ten freight cars observed no protruding bleeder rod (R. 57-8; 75-6; 106) is that no cotter key had broken prior to that time. On this evidence the only proper conclusion is that reached by the Court of Appeals that "nothing, in short, appears from which it might be inferred that the defendant knew or reasonably should have known that the cotter pin was defective."

Petitioner implies that this logical and common-sense conclusion constitutes a new definition of negligence. Actually it merely applies the controlling Illinois authority. In *Chicago & E. I. R. R. Co.* v. *Reilly*, 212 Ill. 506, 72 N.E. 454, plaintiff claimed to have been struck and injured by a piece of timber projecting from a freight car in defendant's train. Plaintiff proceeded on the theory that the car had been negligently loaded, and that the train had been so carelessly managed that a piece of timber was caused to project. A verdict and judgment for the plaintiff were reversed when the Supreme Court held that negligence was not proved, inasmuch as the condition of the timber could have been as readily accounted for on the

hypothesis of pure accident as upon the ground of negligence, and that there was no showing that the defendant had or should have had notice that the timber was projecting. At page 510 of the official report, the Court stated the Illinois rule to be:

> "The rule is well settled that negligence cannot be presumed where nothing is done out of the usual course of business unless that course itself is improper."

That the *Reilly* case enunciates Illinois law with respect to this issue is confirmed by its subsequent history. After the Supreme Court reversal, the case was retried. On the second trial plaintiff proceeded solely on specific charges of negligence. On substantially the same evidence plaintiff obtained another verdict and judgment. On the second appeal, *Chicago Title & Trust Company, Administrator,* v. *Chicago & E. I. R. R. Co.,* 167 Ill. App. 231, the Appellate Court reversed without remanding, holding that negligence had not been proved. The Supreme Court affirmed this decision (255 Ill. 294, 99 N. E. 634). *Franklin* v. *Missouri K. & T. Ry. Co. of Texas* (Tex. Civ. App.), 221 S.W. 2d 918, *Bradley* v. *Lake Shore & M. S. Ry. Co.,* 238 Pa. 315, 86 A. 200, and *Musto* v. *Lehigh Valley R. R.,* 327 Pa. 35, 192 A. 888, all follow the rule stated in the *Reilly* case.

II.

The Court of Appeals correctly applied the established principles of Illinois law governing res ipsa loquitur.

The petition contains three errors concerning the applicability of *res ipsa loquitur* to this case. At page 12 petitioner erroneously assumes that the applicability of the doctrine is an evidentiary question to which Rule 43(a) of the Federal Rules of Civil Procedure applies. Application of the doctrine of *res ipsa loquitur* is determined by the state authorities in a diversity case. *White* v. *United States* (9th Cir.), 193 F. 2d 505; *Woodworkers Tool Works* v. *Byrne* (9th Cir.), 191 F. 2d 667; *Matsumoto* v. *Chicago & N. W. Ry. Co.* (7th Cir.), 168 F. 2d 496, 499; *Ramsel* v. *Ring*, 173 F. 2d 41. After this assumption petitioner cites *I. C. R. R. Co.* v. *Bailey*, 222 Ill. 480, 70 N.E. 833, and *Chicago City Ry. Co.* v. *Pural*, 224 Ill. 324, 79 N.E. 686, for the proposition that whether a *prima facie* case established by *res ipsa loquitur* is rebutted by defendant is a question for the jury. These authorities are inapplicable, since they presuppose the applicability of *res ipsa loquitur*. The applicability of the doctrine in the first instance is a question of law. *Chicago Union Traction Co.* v. *Newmiller*, 215 Ill. 383, 74 N. E. 410; *New York, Chicago & St. Louis R. Co.* v. *Blumenthal*, 160 Ill. 40, 43 N. E. 809. Likewise petitioner assumes that the only basis for the Court holding that this doctrine was inapplicable was that specific negligence had been charged, and evidence presented in support thereof. Petitioner ignores the express finding of the opinion that petitioner had explicitly declined to rely on this doctrine prior to the rendition of the opinion. It is well recognized that an issue may not be raised for the first time upon rehearing in the Court of Appeals, *Marion Steam Shovel Co.* v. *Bertino* (8th Cir.), 82 F. 2d 945;

General Insurance Co. v. *Pathfinder Petroleum Co.* (9th Cir.), 145 F. 2d 368; *W. E. Hedger Transportation Corp.* v. *Ira S. Bushby & Sons* (2d Cir.), 155 F. 2d 321, 325. Certainly if new grounds cannot be set up in support of a petition for rehearing, they ought not be considered by this Court when it is asked to grant discretionary review for the purpose of correcting an allegedly gross error of the court below.

Independent of the foregoing objections, it is clear that under Illinois law *res ipsa loquitur* does not apply. The law is well stated in *Chicago & Eastern Ill. Ry. Co.* v. *Reilly*, 212 Ill. 506, where the Court said, at page 510:

> "The condition can be accounted for as readily on the hypothesis of pure accident and absence of negligence as upon the ground of negligence, and the rule is well settled that negligence cannot be presumed where nothing is done out of the usual course of business unless that course itself is improper."

The reasons why the *Reilly* case governs this issue as well, are well stated in the Court of Appeals' opinion. The *Reilly* case has been subsequently cited with approval by the Illinois Supreme Court in *Bollenbach* v. *Bloomenthal*, 341 Ill. 539, 173 N. E. 670. At page 545 of that opinion the court specifically affirms the holding of the *Reilly* case to the effect that where the condition can be accounted for as readily on a hypothesis of pure accident as upon the grounds of negligence, *res ipsa loquitur* does not apply.

The rule as to the applicability of *res ipsa loquitur*, as stated by the Illinois Supreme Court in the *Reilly* and *Bollenbach* cases was followed by the Seventh Circuit in *Omaha Packing Co.* v. *Pittsburgh, F. W. & C. Ry. Co.*, 120 F. 2d 594. There the evidence established that fire damage resulted from a failure of a bridge to rise, which in

turn was caused by the absence of a cotter key in the bridge mechanism. Numerous theories were advanced to account for the absence of this cotter key. The Court held that the doctrine of *res ipsa loquitur* was inapplicable, saying at page 601:

> "In addition to the reasons stated heretofore, we think the doctrine is inapplicable where it can be reasonably said that the absence of the cotter key was as consistent with ordinary care as with negligence. The fact is that it is far more reasonable, under the circumstances, to believe that the key was absent because of breakage occasioned by a latent defect, than any of the other possibilities suggested."

In the instant case, the train was inspected prior to its movement from the Waukegan yard, where the only defect discoverable was a missing draft key, which would not have caused the car involved to be taken out of service. The record does not show that the car from which the draft key was missing was the one on which petitioner testified he saw the protruding rod. Petitioner's own expert testified to a number of causes for cotter key failures on bleeder rod assemblies. He also testified that the possibility of such failures could not be discovered by routine inspection, and that customarily on the railroad upon which he was employed (not the respondent) an annual inspection was made to determine whether the cotter keys were in good condition. Petitioner offered no evidence that a defective cotter key would always be discovered by inspection or that annual inspections were not made. In view of the routine inspection preceding the movement of the train, the most logical hypothesis is that the cotter key had not snapped at the time the train moved, and that, if it snapped at all, it did so during the movement from the Waukegan yard. Since respondent would have had no opportunity to discover this, the occurrence falls into the cate-

gory of accident. The rule that *res ipsa loquitur* is inapplicable unless it is shown that the accident is one which would not occur if defendant used due care has been recently enunciated in the case of *Simmons* v. *South Shore Hospital,* 340 Ill. App. 153, 91 N.E. (2d) 135.

In the instant case the Court of Appeals also followed Illinois law in holding that evidence as to the specific cause of the accident was sufficient to avoid the application of the doctrine. In *Adamsen* v. *Magnelia,* 280 Ill. App. 418, 425, the rule is stated to be that if the evidence explains or shows the cause of the occurrence complained of, there is no room for the application of the doctrine of *res ipsa loquitur.* It is this principle which distinguishes *Wm. Wrigley, Jr. Co.* v. *Standard Roofing Co.,* 325 Ill. App. 210, 59 N. E. 2d 510, relied on at page 13 of the petition. In that case, the issue involved was whether or not the Roofing Company was liable for Workmen's Compensation to be paid by plaintiff to the widow of an employee who was killed when he was struck by a ladder which fell from the roof of one of plaintiff's buildings in the course of work being performed by the defendant. The complaint contained separate counts, some based on *res ipsa loquitur* and others on negligent placing of the ladder. It was admitted that the ladder was blown from the roof by a gust of wind. The Court held that since the cause of the accident had been shown, *res ipsa loquitur* was inapplicable (see p. 216 of the opinion).

In a later case, *Jackson v. 919 Corporation,* 344 Ill. App. 519, 528, 101 N.E. (2d) 594, the Court held that *res ipsa loquitur* did not apply where plaintiff had introduced evidence showing the specific cause of the accident. The Court ruled that on remand of the case the plaintiff could amend her complaint to include a charge of general negli-

gence, but that if she wished to stand on her charges of specific negligence, involving proof of a definite cause, she could not avail herself of the doctrine. From the *Jackson* case it is clear that these are not permissible alternatives under Illinois law, but that the introduction of evidence of the specific cause of the accident renders *res ipsa loquitur* inapplicable.

Even if the Court of Appeals misapprehended the impact of *res ipsa loquitur* in *Wadiak* v. *Illinois Central R. Co.* (7th Cir.), 208 F. 2d 925, that ruling would have no significance in the instant case, since the opinion herein is consistent with the govering Illinois decisions. Read in context, however, the portion quoted by the plaintiff shows that the doubt on the part of the Court as to the applicability of *res ipsa loquitur* in actions under the Federal Employers' Liability Act arises, not from any consideration of the provisions thereof, but from the practical fact that since actions thereunder are only brought against the carrier by its employees for injury in the course of their employment, plaintiffs are usually able to, and do, in fact, introduce evidence of specific negligence. The petition herein (ptn. 14-15) attempts to obscure the simple truth that the Court of Appeals studied the Illinois law of *res ipsa loquitur* and correctly applied it. Such being the case, whatever the Court of Appeals may have done in other litigation is entirely immaterial.

III.

Petitioner has shown no grounds for invoking the certiorari jurisdiction of this Court.

Even upon the hypothesis that error had been committed by the court below, it could only have consisted in drawing improper inferences from the facts in the record. As this court said in *General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, at page 178, "granting the writ would not be warranted merely to review the evidence or inferences drawn from it." The spirit in which certiorari jurisdiction is exercised was unmistakably indicated by the late Chief Justice Taft at page 163 of the opinion in *Magnum Co.* v. *Coty*, 262 U.S. 159, where he said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes, the first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred on this Court to give the defeated party in the Circuit Court of Appeals another hearing*" (emphasis supplied).

Unable to demonstrate the presence of any of the grounds for certiorari in the record and opinion in this case, yet desirous of obtaining another hearing, petitioner attempts to crowd this case into the category of cases in which this Court exercises its supervisory power. Counsel presents a collection of inaccurate citations purporting to show that the Court of Appeals misconceives its function. Accepted at the face value asserted by the petition, they would only show that the court fails to find a way for plaintiffs to recover in every personal injury case. Such failure is not a misconception of the

function of the reviewing court. Moreover, counsel's statistics are quite inaccurate. Appendix A to this petition contains a short resume of the cases cited at page 9 of the petition. The results demonstrate the inaccuracy of plaintiffs statement of what these cases purport to hold. Of the twenty-six there cited, only five decisions in favor of plaintiff were reversed on the grounds that there was no negligence shown (certiorari was denied in three). Six were reversed for failure to prove freedom from contributory negligence on the part of the plaintiff (certiorari being denied in two). Four were affirmances of directed verdicts entered in favor of defendants in the trial courts (certiorari was denied in two of these). Six were affirmances of judgments notwithstanding the verdict or judgments notwithstanding the failure of the jury to agree. Of the remainder, one was an affirmance of a jury verdict for the plaintiff; one was a reversal of a directed verdict for the defendant on the ground that there was evidence of negligence; one was reversed because of errors in instructions, the court also holding, however, that defendant's motion for a directed verdict was properly denied; and one affirmed the dismissal of complaint for failure to state a cause of action. One case was not related to negligence, but was determined on the ground that plaintiff's intestate was not a "seaman" under the Jones Act. Clearly, these results demonstrate the fallacy of petitioner's statistics. Moreover, petitioner omits fifteen cases reported in these same volumes in which the Court of Appeals for the Seventh Circuit affirmed judgments in favor of plaintiffs, and six cases in which judgments for defendants were reversed.

The relevancy of petitioner's argument with respect to the attitude of the Court of Appeals for the Seventh

Circuit compared with the Illinois courts toward large verdicts is not apparent (Ptn. 9-10). There is no indication that the Court of Appeals considered the verdict in this case to be so large as to require it to scan the record more closely for error.[1]

Moreover, this claimed discrepancy between the Illinois courts and the federal courts is much at variance with a petition for rehearing filed by petitioner's counsel in another case entitled *Olson* v. *Chicago Transit Authority*, 1 Ill. 2d 83, 115 N.E. 2d 301, in which, on the basis of a similar type of statistical comparison, he vehemently complained of the bias exhibited by the First Division of the First District of the Appellate Court of Illinois. At page 17 of this petition, counsel said:

> "The cold hard fact of the matter is that the public is being constantly penalized by this Division of the Court because he might seek a remedy in court of law. Today, as the *Hall* case (*Hall* v. *Chicago & North Western Ry. Co.*, 349 Ill. App. 175), the *Lees* case (*Lees* v. *Chicago & North Western Ry. Co.*, 409 Ill. 536), and this case well demonstrate the quest of a remedy is a project of a lifetime. • • • What we have said, we assure this court, has no personal basis. Nor is it a question of losing a case. The issue is far greater. It is: How long must the public suffer trials *de novo* when their cases are assigned to this Division of the Appellate Court?"

Counsel's criticism of the Court of Appeals for the Seventh Circuit is not new to this Court. *In Spikings* v. *Wabash R. Co.*, 201 F. 2d 492, cert.den. 345 U. S. 992, this

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[1] The case referred to by counsel for the petitioner as *Martinez* v. *Chicago and North Western Ry. Co.* is actually the case of *Martinez* v. *Chicago Great Western Ry. Co.* The settlement made in that case obviously would have no bearing herein.

same counsel charged that the Seventh Circuit wrongfully adopted the general practice of weighing the evidence in personal injury cases. This contention met with a well deserved denial of certiorari. Although respondent recognizes the proper significance to be attached to such a denial, we submit that the same result should obtain here, particularly since many of the cases which counsel submits as evincing this tendency have been unsuccessfully presented to this court on petition for certiorari.

Conclusion.

No basis for reversal of the opinion of the Court of Appeals in this case exists. The decision is clearly supported by controlling Illinois decisions which were properly applied to the facts as they appeared on the record. Much less is a basis for certiorari shown, since the only issue which could possibly be presented would be one involving further review of the evidence as measured against the same Illinois decisions. Recognizing this, petitioner's counsel has fallen back upon his usual tactics of asserting bias and incompetence on the part of the reviewing tribunal. He has done so on the basis of an erroneous and inaccurate pseudo-statistical study.

For the above and foregoing reasons we respectfully submit that the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is without merit, and should be denied.

Respectfully submitted,

Otis Lowell Hastings,
Drennan J. Slater,
Gerald M. Chapman,
Attorneys for Respondent.

APPENDIX A.

Synopsis of cases cited by petitioner as being reversals of judgments for plaintiff.

At pages 8 and 9 of the petition it is claimed that twenty-six cases, resulted in reversals of judgments for plaintiffs in the Court of Appeals for the Seventh Circuit on the ground that there was not sufficient evidence of negligence to take the case to the jury. The actual basis of decision in these cases is indicated below.

Cases in which judgments for plaintiffs were reversed because of insufficient evidence of negligence.

Wendell v. *Chicago, R. I. & P. R. Co.*, 184 F. 2d 868.

O'Keefe v. *Wabash R. R. Co.*, 185 F. 2d 241 cert den., 341 U. S. 921.

Ernst v. *Jewel Tea Co.*, 197 F. 2d 881, cert den., 344 U. S. 918. (Miscited as 197 F. 2d 88.)

Repsholdt v. *United States*, 205 F. 2d 852, cert. den., 346 U. S. 901. (Miscited as *Repshodt* v. *United States.*)

Wadiak v. *Illinois Central R. Co.*, 208 F. 2d 925.

Cases reversed on the ground that plaintiff failed to prove freedom from contributory negligence, or because contributory negligence as a matter of law was established by the record.

Cox v. *Kroger*, 179 F. 2d 382. (An automobile accident case in which the Court also found that there was evidence from which the jury could have found negligence.)

Hoff v. *Donaldson*, 184 F. 2d 419.

Reynolds v. *Baltimore & O. R. Co.*, 185 F. 2d 27, cert. den., 340 U. S. 947.

Appendix.

Ackermann v. *Hicks*, 193 F. 2d. 345. (A judgment for plaintiff against one defendant was affirmed. Reversal, on the ground of contributory negligence, was on a cross-claim between two of the defendants.)

Spikings v. *Wabash R. Co.*, 201 F. 2d 492, cert. den., 345 U. S. 992. (A crossing case in which plaintiff was guilty of contributory negligence as a matter of law. Plaintiff therein was represented by the same counsel as the one representing petitioner in this case.)

Barrett v. *Chicago & N. W. Ry. Co.*, 207 F. 2d 5.

Cases in which directed verdicts for defendants were affirmed.

Billman v. *Kroger Co.*, 185 F. 2d 120.

Griffy v. *Havey*, 201 F. 2d 501. (Miscited as *Guffey* v. *Havey*.)

Wetherbee v. *E. J. & E. Railroad Co.*, 204 F. 2d 755, cert. den., 346 U. S. 867.

Petermichl v. *Chicago & N. W. Ry. Co.*, 205 F. 2d 434, cert. den., 346 U. S. 916.

Cases in which judgments notwithstanding verdicts or disagreements of juries were affirmed.

Swigart v. *Chicago & N. W. Ry. Co.*, 180 F. 2d 177.

Quirk v. *New York, C. & St. L. R. Co.*, 189 F. 2d 97, cert. den., 342 U. S. 871. (The basis of decision was that an employee going home on one of the railroad's motor cars was not engaged in employment under the F. E. L. A. at the time of the accident.)

McGunegill v. *Chesapeake & O. Ry. Co.*, 199 F. 2d 302.

Reilly v. *Chicago & N. W. Ry. Co.*, 201 F. 473, cert. den., 345 U. S. 997. (Whether the municipal authorities had served the notice to fence required by the ordinance on which plaintiff relied?)

Appendix.

Koch v. *Chicago & N. W. Ry. Co.*, 208 F. 152.

Stephens v. *Sears, Roebuck & Co.*, 212 F. 2d 260. (Miscited as *Stevens* v. *Sears, Roebuck & Co.*, 211 F. 2d 260.)

Miscellaneous cases not determined on the basis of failure to prove negligence.

Desper v. *Starved Rock Ferry Co.*, 188 F. 2d 177, affirmed, 342 U. S. 187, reh. den., 342 U. S. 934. (The basis of the decision was that plaintiff's intestate was not a "seaman" under the Jones Act.)

Schroeder v. *Minneapolis, St. Paul & S. S. M. R. Co.*, 204 F. 2d 758. (A case in which no verdict was involved, since the trial judge dismissed the complaint and plaintiff elected to stand on the complaint.)

Hill v. *Railway Express Agency*, 187 F. 2d 184. (Refusal to direct a verdict for the defendant affirmed. Reversal was on the ground of errors in instructions. Mr. Dooley represented the plaintiff.)

Heller v. *Select Lake City Theatre Co.*, 187 F. 2d 649. (Directed verdict for the defendant reversed on the grounds that there was evidence of negligence.)

Fiedler v. *Chicago & N. W. Ry. Co.*, 204 F. 2d 515. (A jury verdict for the plaintiff was affirmed by the Court of Appeals.)

Cases Favorable to Plaintiffs.

At page 9 of the petition four cases are listed as being affirmances of judgments for plaintiffs. One of these, *Nattens* v. *Grolier Society*, 195 F. 2d 449, was actually a reversal of a judgment n.o.v., entered by the trial court in favor of the defendant. In addition to the *Fiedler* and *Heller* cases, which should have been included in this

category rather than among the twenty-six cases cited as being favorable to the defendant, judgments for plaintiffs were affirmed in the following cases during the period covered by Mr. Dooley's survey:

Hynes v. *Indian Trails*, 181 F. 2d 668, cert den., 340 U. S. 824.

Plummer v. *Spence*, 182 F. 2d 958.

Leach v. *Maryland Casualty Co.*, 183 F. 2d 43.

Mead v. *Cochran*, 184 F. 2d 579.

McGilvray v. *Powell 700 North*, 186 F. 2d 909.

Reeder v. *Tosh*, 187 F. 2d 10.

Frazier v. *Sims Motor Transport Lines*, 196 F. 2d 914.

Stewart v. *United States*, 199 F. 2d 517.

Pearson v. *Baltimore & Ohio R. Co.*, 200 F. 2d 569.

Koehler v. *U.S.*, 200 F. 2d 588.

Tillman v. *Great American Indemnity Co. of New York*, 207 F. 2d 588.

Carter v. *John Henner Trucking Co.*, 210 F. 2d 443.

Norling v. *Carr*, 211 F. 2d 897.

Petitioner's counsel also neglects to cite the following cases in which judgments for defendants were reversed:

Desch v. *United States*, 186 F. 2d 623.

Stewart v. *United States*, 186 F. 2d 627, cert. den., 341 U. S. 940.

Mattison v. *Brown*, 197 F. 2d. 414.

Drinan v. *A. J. Lindemann & Hoverson Co.*, 202 F. 2d 271.

Colas v. *Grzegorek*, 207 F. 2d 705.

Grivas v. *Parmelee Transp. Co.* 207 F. 2d 334, cert. den., 347 U. S. 913.

Heller v. *Select Lake City Theatre Co.*, 187 F. 2d 649.

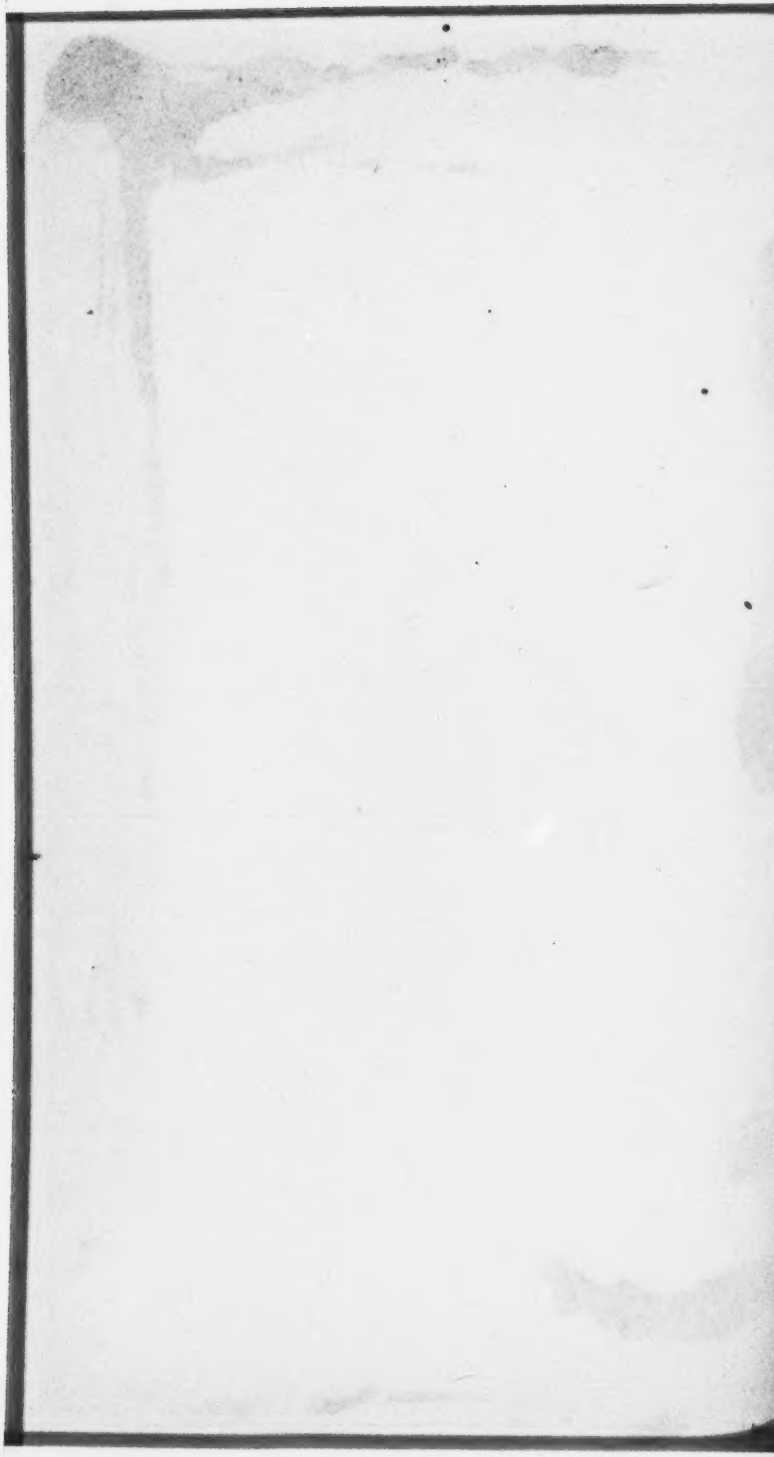
APPENDIX B.

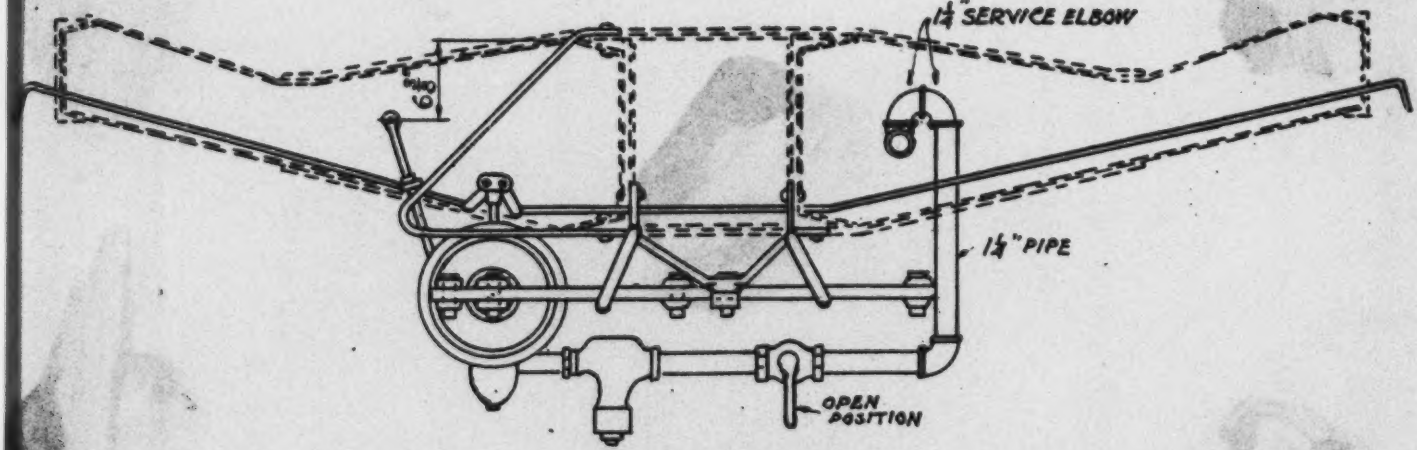
Reproduction of Defendant's Exhibits.

The exhibits contained herein are reproduced in the following order.

Defendant's Exhibit 7, a photograph showing the lower portion of the side of a box car.

Defendant's Exhibit 16, reproduction of a portion of a blueprint showing the cross bearer section under a box car.





SECTION AT CROSSBEARER

FILED
OCT 4 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 201

FRANK KUCHIN,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY.

JAMES A. DOOLEY,
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Chicago 2, Illinois,
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THE BLAKELY-GARDNER PRINTING COMPANY, CHICAGO

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REPLY.

I.

The Importance of Certiorari Here.

Respondent states that though error had been committed by the court of appeals, such is no warrant for certiorari (p. 17).

It overlooks the real issue, namely, whether in a diversity action a federal court can employ a concept of negligence different from that employed by the Supreme Court of the state in which the action arises and wherein the federal court sits.

This case involves not only Kuchin. It concerns every litigant seeking a jury trial in a negligence action—that type of case which today constitutes most of the litigation on the law side of the civil docket. If in a diversity action a federal court in this district can employ a definition of negligence narrower than that recognized by the highest court of Illinois, the remedy will be determined by the particular court in which the litigant seeks his remedy.

But there is more. There is that encroachment upon the function of the jury so classically demonstrated when a court undertakes to state what is negligence and discards the specific findings of a jury.

Was there evidence of negligence? Here petitioner was in a *public* place where he had a right to be (R. 117, 118, 119). Here he was on a path used by the public for many years (R. 12, 16, 23, 25, 26, 27). Here respondent's employees knew of the public character of the path, and its use by children and adults (R. 81). Here he was struck down by a bar protruding from a box car operated by respondent, *a fact specifically demonstrated by a special verdict* (R. 130). Here the cars were to be inspected before leaving respondent's yard prior to the accident. Here, upon inspection after the accident, one was found to be in "bad order" and should not have been in use. Here, indeed, there was evidence that it was in "bad order" in the yard before the inspection (R. 77).

The court of appeals said that was not negligence. The Illinois Supreme Court in the recent (January, 1954) case of *Ney* v. *Yellow Cab Co.*, 2 Ill. 2d 74, 117 N. E. 2d 74, has this to say about the function of the jury on what is, or is not, negligence:

> "Questions of negligence, due care and proximate cause are ordinarily questions of fact for a jury to decide. The right of trial by jury is recognized in the Magna Charta, our Declaration of Independence and

both our State and Federal constitutions. It is a fundamental right in our democratic judicial system. Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. The debatable quality of issues such as negligence and proximate cause, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness and necessity of leaving such questions to a fact-finding body. The jury is the tribunal under our legal system to decide that type of issue. To withdraw such questions from the jury is to usurp its function. *Bailey* v. *Central Vermont Railway Co.*, 319 U. S. 350." (p. 84.)

II.

The Decisions of the Court of Appeals Positively Demonstrate a Misconception of Its Function.

Rule 19 of this court provides that certiorari will be granted where a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, * * * as to call for an exercise of this court's power of supervision * * *."

The court of appeals, it is fundamental, has limited functions.

We cited cases in which verdicts had been set aside. Respondent is technically correct when it states that all of them were not reversed on the ground of want of negligence. The fact remains, however, that the plaintiff was denied a recovery. Three, we assure the court, were inadvertently put in this list.*

* *Heller* v. *Select Lake City Theatre Co.*, 187 F. 2d 649. Directed verdict for defendant reversed.

Fiedler v. *C. & N. W. Ry. Co.*, 204 F. 2d 515. Verdict for plaintiff affirmed.

Hill v. *Ry. Express Agency*, 187 F. 2d 184. New trial granted defendant.

Respondent has sought to nullify this situation by appendices. However, that there can be no question,—look at what has occurred in negligence cases reported from 200 F. 2d (November, 1952) until ~~the present~~ Aug. 23, 1954 in the Seventh Circuit.

Vol. 200 F. (2nd).

Kaminski v. *Chicago River & Ind. R. Co.*, 200 F. 2d 1. Plaintiff conductor fell through an empty coal pit which had been covered. Employee's verdict reversed. (But see *Wilkerson* v. *McCarthy*, 336 U. S. 53.)

Pearson v. *B. & O. R. Co.*, 200 F. 2d 569. Recovery for plaintiff affirmed in crossing accident where defendant's signal was not working.

Vol. 204 F. (2nd).

Fiedler v. *C. & N. W. Ry. Co.*, 204 F. 2d 515. Judgment for plaintiff passenger on defendant's railroad affirmed.

Wetherbee v. *E. J. & E. R. Co.*, 204 F. 2d 755. A directed verdict in a death action under the FELA affirmed on insufficiency of evidence of negligence.

Schroeder v. *Minn., St. P. & S. S. M. R. Co.*, 204 F. 2d 758. Trial court's holding in automobile and freight train collision that sole proximate cause of accident was negligence of motorist affirmed.

Vol. 205 F. (2nd).

Petermichl v. *C. & N. W. Ry. Co.*, 205 F. 2d 434. Directed verdict against plaintiff passenger in attempting to board moving train affirmed. (But see *C. & A. R. R. Co.* v. *Gore*, 202 Ill. 188, 66 N. E. 1063, which is directly contrary.)

Vol. 207 F. (2nd).

Barrett v. *Chicago & N. W. Ry. Co.*, 207 F. 2d 5. Plaintiff, standing on defendant's platform, caught in suction of passing train. Judgment for plaintiff reversed (one judge dissenting). (But see *Bernier* v. *I. C. R. R. Co.*, 296 Ill. 464, 29 N. E. 747.)

Colas, et al. v. *Grzegorek, et al.*, 207 F. 2d 705. Judgment for defendant reversed and plaintiff given new trial because answers of jury to special verdict inconsistent.

Vol. 212 F. (2nd).

Pringle v. *G. M. & O. R. Co.*, 212 F. 2d 632. Judgment for plaintiff reversed.

Koch v. *C. & N. W. Ry. Co.*, 208 F. 2d 152. Directed verdict for defendant affirmed on ground of contributory negligence.

Wadiak v. *I. C. R. Co.*, 208 F. 2d 925. Judgment for employee in FELA action reversed. (But see *Stone* v. *N. Y. C. & St. L. R. Co.*, 344 U. S. 407 which is contrary.)

Carter v. *John Hennes Trucking Co.*, 210 F. 2d 443. Judgment for plaintiff affirmed.

Hunter Packing Co. v. *B. & O. R. Co.*, 210 F. 2d 448. Judgment for plaintiff reversed on ground of insufficiency of evidence of negligence.

Kuchin v. *C. & N. W. Ry. Co.*, 210 F. 2d 863. Judgment for plaintiff reversed on insufficiency of evidence of negligence.

Stephens v. *Sears Roebuck & Co.*, 212 F. 2d 260. Judgment notwithstanding the verdict of jury affirmed on ground of insufficiency of evidence of negligence.

Thus, from 200 F. 2d to August 23, 1954, out of fourteen decisions, eleven have been reversed or directed verdicts for defendants affirmed. *Recoveries have been allowed to stand in but only three cases.* Thus, almost 80% of all cases from November, 1952 to August 23, 1954 have resulted favorably for defendant by virtue of reversal of verdicts or affirming trial court's direction of verdicts.

Indeed, trial courts are loath to allow verdicts for plaintiffs to stand because of a constant fear of reversal—a condition which exists in no other circuit.

Respondent's answer reeks with personal references to petitioner's counsel. We realize this court is not interested in such matters. We realize, too, that such is not an issue. Moreover, petitioner's counsel will stand on his own record.

Respectfully submitted,

JAMES A. DOOLEY,
Attorney for Petitioner,
111 W. Washington Street,
Chicago 2, Illinois.

NOV 8 1954
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 201

FRANK KUCHIN,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 201

FRANK KUCHIN,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

On October 14, 1954, this Court entered the following order on Petitioner's Petition for Certiorari:

"The petition for writ of certiorari is denied."
"Mr. Justice Black and Mr. Justice Douglas are of the opinion the petition should be granted."

In accord with Rule 58 of this Court, Petitioner desires to call the Court's attention to intervening circumstances of substantial or controlling effect.

On September 23, 1954, the Illinois Supreme Court filed an Opinion in Cause No. 33177 Entitled Pitrowski, Administrator v. The New York, Chicago & St. Louis Railroad Company. This Demonstrates Why Certiorari Should be Granted Here.

The *Pitrowski* opinion (attached hereto as an appendix, since it is not yet published) graphically illustrates that the concept of the Court of Appeals as to what is evidence of negligence is at loggerheads with and directly contrary to that of the Illinois Supreme Court—the Court whose definition controls in this diversity case. A consideration of this opinion, together with an opinion of the Court of Appeals in an identical situation, reveals a most unwholesome and discriminatory condition. A litigant can recover on the same case, if he be in the courts of Illinois, but will be denied relief should he be in a United States District Court in this state.

In the *Pitrowski* case, it appeared that plaintiff's decedent was killed while switching on the tracks of the Bell Fibre Products Company, an industry. Two boxcars were being pushed in a northerly direction by a locomotive, with the decedent riding on the east side of the most northerly car. The yard conductor preceded the cars and locomotive to a point where the train entered the plant. As the train went north, it passed into a "tunnel" made by the sides and overhang of an adjoining building.

The cars were derailed when they struck a "dolly" on the track. It was 10 or 12 inches high and 7 or 8 feet long and was used by the industry in its work.

There was no evidence as to when the dolly was placed on the track or how long prior to the accident it had been there.

The defendant was required to maintain the industry tracks under the terms of its agreement with the Bell Fibre Products Company.

Plaintiff administrator obtained a judgment in the Circuit Court of Cook County, and the Appellate Court of Illinois, First District, (1 Ill. App. 2d 63, 116 N.E. 2d 173) reversed that judgment. However, the Supreme Court of Illinois held that there was an issue of fact for the jury.

But consider *Wetherbee* v. *E. J. & E. Ry. Co.*, decided by the Court of Appeals for the Seventh Circuit, 191 F. 2d 302, 204 F. 2d 755, certiorari denied, 346 U.S. 867, Mr. Justices Black and Douglas being of the opinion that the writ ought to be allowed.

There, as in the *Pitrowski* case, plaintiff's decedent was a switchman, riding the lead end of two boxcars which were being pushed on a track within the premises of an industry. Adjacent to the track was a concrete loading dock about 4 feet high and 108 feet long. There was a clearance of approximately 5½ feet between the wall and the rail. The railroad car hit a plank on the track and became derailed, causing the death of plaintiff's decedent.

Indeed, there was more for the plaintiff in the *Wetherbee* case. It appeared that prior to the movement, Venske, the switchman, had preceded the train, thrown the switch and had signaled it to come ahead. There was a verdict on the first trial, and, in reversing and remanding it, the Court of Appeals held there was no issue of negligence, except the conduct of Venske, whose testi-

mony as to whether he saw anything obstructing the track was obscure. (191 F. 2d 302, 308.)

On the retrial "As might be expected, however, the testimony of the remaining member of the crew, Venske, was much more detailed * * * " (*Wetherbee* v. *E. J. & E. Ry. Co.,* 204 F. 2d 755, 757.)

It was held that there could be nothing to support giving the case to the jury, and the Court of Appeals affirmed a verdict by the District Court. (*Wetherbee* v. *E. J. & E. Ry. Co.,* 204 F. 2d 755.)

The absolute contradiction between the two cases is patent from the facts themselves. But, consider for a moment the disparity in legal principles between the two decisions.

Here the Court of Appeals held, as a matter of law, that there was no evidence of negligence on the part of the defendant, because the man who preceded the train testified he was not in a position to see a plank on the track. But in the *Pitrowski* case, the Illinois Supreme Court *held there was a duty on the part of the defendant to know the condition of the track before shoving cars into it.*

Then, too, the Court of Appeals held there was no evidence of failure to provide a safe place to work, since any such failure was due to the plaintiff's decedent's conduct. (191 F. 2d 302, 310.) But the Supreme Court of Illinois, in the *Pitrowski* case, held specifically:

> *"Likewise, the question of whether defendant was negligent in not taking additional measures to furnish its employees with a safe place to work was a question of fact for the jury."* (Italics ours.)

How can the two opinions be reconciled? Had Mrs. Pitrowski filed her case in the United States District Court and obtained a verdict, and the Court of Appeals were to adhere to the *Wetherbee* case, recovery would have been denied her. On the other hand, if Mrs. Wetherbee had filed her case in the State Court, she would find respect for her right to a jury determination on the issue of negligence.

In the State of Illinois there are 8,712,176 citizens.* Each of these is a potential litigant. Each of these may some day be confronted with the problem of seeking reparation for an injury or death. If he finds himself in a Federal Court of this State, he will be at a distinct disadvantage, and the party against whom the action is brought will enjoy greater privileges than the law accords. This, of course, raises questions involving basic constitutional rights of due process and equal protection of the laws. Due process of law cannot consistently assume one shape in a State Court and another in a United States Court in the same State.

This was your reasoning in *Erie* v. *Tompkins*, 304 U.S. 64. You pointed out that:

> "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift* v. *Tyson* introduced grave discrimination by non-citizens against citizens. *It made rights* enjoyed under the unwritten 'general law' *vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law.*" (pp. 74, 75.) (Italics ours)

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* 1950 Census. Census Bureau, Washington, D. C.

When it is remembered that the non-citizen railroad removed this cause from the Circuit Court of Lake County, Illinois, where it had been commenced, to the United States District Court on the basis of diversity of citizenship, (Rec. 2) this reasoning becomes especially pertinent here. **Had the cause remained in the State Court, one must perforce conclude from the opinions of the Illinois Supreme Court that the issues of defendant's negligence would be for a jury.**

This grotesque condition is not, as the records indicate, confined to this instance. It is a hazard every litigant in this Circuit must recognize in ascertaining where to lodge his case and how to prevent a non-resident defendant from selecting the court in which he will be given a special consideration.

This Court has concerned itself with the questions of due process and equal protection of the laws, those clauses of the Federal Constitution in which are found the basic personal rights. But is there any greater denial of equal protection effected, when a state-defined right is so interpreted by a state court as to allow reparation, but is refused recognition in the federal forum? The effect of this violation of the due process clause of the Fifth Amendment is more far reaching than the problem presented by discrimination because of color in educational institutions.*

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* Brown v. Board of Education of Topeka, 980 S.Ct. 583, Briggs v. Elliott, 98 S. Ct. 583; Davis v. County School Board of Prince Edward County, 98 S.Ct. 583, and Gebhart v. Belton, 98 S.Ct. 583; Bolling v. Sharpe, 98 S. Ct. 591.

It concerns whether there shall be a remedy for a wrong. For Mrs. Wetherbee and her four children it meant that a jury's verdict in the sum of $80,000 was reversed and finally she was left remediless. To others like Frank Kuchin, it means that such personal rights as freedom from injury with resulting loss of constitutional liberty* can be violated with impunity.

This, we submit, is as momentous a constitutional question as comes to this Court.

II.

Lavender v. Kurn, 327 U.S. 645, *Controls Here, Moreover, it has Been Adopted* by the Illinois Supreme Court in Defining What *Constitutes Evidence of Negligence.*

The Illinois Supreme Court, in Pitrowski, Admr. v. The New York, Chicago & St. Louis Railroad Company, as late as September 23, 1954, stated that Lavender v. Kurn, 326 U.S. 645, was a determining authority as to what constitutes evidence of negligence. In *Lavender* v. *Kurn*, 327 U.S. 645, the decedent, a switch tender, was found lying on the ground north of the track near a switch after a train had backed in a westerly direction. He had been struck in the back of the head. His body lay in a northerly and southerly direction, and the left side of his face was bruised. His head was 5½ feet north of the tracks and he lay somewhere between 2 to 14 feet west of the switch. It was plaintiff"'s theory that he was struck by the end of the mail hook hanging down on the outside of the mail car of the backing train. The overhang of the mail car was 2 to

* "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." (Bowling v. Sharpe, 98 S. Ct. 591)

2½ feet. When it swayed around a curve, the hook might pivot, so that its curled end might swing out 12 to 14 inches. East and west of the switch was an uneven mound of cinders between 18 and 24 inches above the rails.

It was plaintiff's theory that the decedent had been standing on the mound about a foot from the side of the mail car and was hit by the end of the mail hook. No one saw the accident. The Supreme Court of Missouri reversed a judgment in favor of the plaintiff on the ground that there was no evidence of negligence. This Court, with only one Judge dissenting, held that if plaintiff's decedent were struck by an object projecting from the side of a railroad car, such fact constituted evidence of negligence.*

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* "The evidence we have already detailed demonstrates that there was evidence from which it might be inferred that the end of the mail hook struck Haney in the back of the head, an inference that the Supreme Court admitted could be drawn. That inference is not rendered unreasonable by the fact that Haney apparently fell forward toward the main Frisco track so that his head was 5½ feet north of the rail. He may well have been struck and then wandered in a daze to the point where he fell forward. The testimony as to blood marks some distance away from his head lends credence to that possibility, indicating that he did not fall immediately upon being hit. When that is added to the evidence most favorable to the petitioner as to the height and swing-out of the hook, the height and location of the mound and the nature of Haney's duties, the inference that Haney was killed by the hook cannot be said to be unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury." (Lavender v. Kurn, 327 U.S. 645, 652.)

The Supreme Court of Illinois, in *Lindroth* v. *Walgreen Co.*, 407 Ill. 121, 94 N.E. 2d 847, a common law negligence action, held *Lavender* v. *Kurn, supra,* controlling on the all important principle as to what constitutes evidence of negligence.*

Thus, when the Illinois Supreme Court itself declares that if a person is struck by an object protruding from a railroad car, such is evidence of negligence to be submitted to the jury, how can the Court of Appeals hold there is no evidence of negligence in this case?

It is respectfully submitted that eventually this Court must intervene to protect the basic rights of citizens in this Circuit.

Granting certiorari here and re-defining the function of the Court and the function of the jury will have a

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* "In Lavender v. Kurn, 327 U.S. 645, 35 S. Ct. 740, the deceased, a switch tender, was found dead alongside defendant's railroad tracks. The evidence showed he had been struck in the head by some object which fractured his skull and caused his death. There was no eyewitness. It was shown that during the time that deceased was at the place of his injury a train passed which was equipped with a mail hook which, if it was extended, could have struck the deceased and inflicted the injury. The question was raised as to whether the jury could reasonably infer from these facts that the hook struck and killed deceased. It was not shown that the hook was in fact extended at the time and place of deceased's injury, and it did appear that, except for an elevation in one place in the ground along the track, the hook, even if extended, was too high to have struck the deceased standing on the ground. The court held the case, on this evidence, was properly submitted to the jury, and that it would reasonably be inferred that the death was caused by the extended hook." (Lindroth v. Walgreen Co., 407 Ill. 121, 132, 133; 94 N. E. 2d 847.)

salutary effect upon the administration of justice in this Circuit.

It is respectfully submitted that the Court reconsider its order denying certiorari and grant the writ.

Respectfully submitted,

JAMES A. DOOLEY,
Attorney for Petitioner.

CERTIFICATION.

James A. Dooley hereby certifies that he is counsel for the Petitioner and represented him in the District Court, the Court of Appeals and this Court; that this Petition for Rehearing is presented in good faith and not for delay.

He states that the opinion of the Illinois Supreme Court in *Pitrowski* v. *The New York, Chicago & St. Louis R. R. Co.*, Cause No. 33177, was not filed until September 23, 1954, and has not as yet been published; that the said opinion was not available to him at the time of the filing of the original petition; that he has limited this Petition for Rehearing of the Order Denying a Petition for Writ of Certiorari to an argument based upon the conflict in the law of negligence as enunciated by the highest court of Illinois and that defined by the Court of Appeals for the Seventh Circuit and the resulting Constitutional problems from such conflict; he states he refers to *Lavender* v. *Kurn*, 327 U.S. 645, since the said case was cited with approval by the Illinois Supreme Court in the *Pitrowski* decision.

APPENDIX.

Docket No. 33177—Agenda 32—May, 1954.

Ruth Pitrowski, Admr., Appellant, v. The New York, Chicago & St. Louis Railroad Company, Appellee.

Mr. JUSTICE KLINGBIEL delivered the opinion of the court:

This action was brought in the circuit court of Cook County by Ruth Pitrowski, plaintiff-appellant, under the provisions of the Federal Employer's Liability Act (45 U.S.C.A. sec. 51 *et seq.*) against the New York, Chicago & St. Louis Railroad Company, to recover damages for the death of her husband.

At the trial, defendant introduced no evidence, but elected to stand upon its motion for directed verdict at the close of plaintiff's evidence. Defendant's motion having been denied, the cause was submitted to the jury, which returned a verdict in favor of plaintiff, and judgment was entered thereon in the amount of $100,000. On appeal, the Appellate Court for the First District reversed without remanding, holding that plaintiff had failed to prove any negligence on the part of defendant and, therefore, the trial court erred in refusing to direct a verdict for the defendant. Plaintiff's petition for leave to appeal having been allowed, the cause is now before this court for consideration.

On this state of the record, it is the duty of this court to examine the record to determine whether there is any evidence which, taken with its intendments most favorable to the plaintiff tends to support the charge of the compiaint. (*Mueller* v. *Elm Park Hotel Co.* 398 Ill. 60, 63.) Section 51 of the Federal Employer's Liability Act provides that a railroad carrier engaged in interstate commerce shall be liable in damages for any injury or

death of an employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." The act also abolishes the defenses of contributory negligence and assumption of risk. Thus, the only question which we are now called upon to answer is whether there is any evidence in the record, viewed in the light most favorable to the plaintiff, to support the jury's conclusion that defendant was guilty of negligence which contributed to decedent's death, or if there is any evidence from which such negligence could reasonably be inferred. *Lavender* v. *Kurn*, 327 U.S. 645; *Bonnier* v. *Chicago, Burlington and Quincy Railroad Co.* 2 Ill. 2d 606.

The record discloses that decedent met his death at about 3:30 A.M. on October 15, 1951, while engaged in a switching operation for defendant on the industry tracks of the Bell Fibre Products Company plant in Chicago. The accident took place on the spur track which extends in a northerly direction from defendant's tracks into the Bell Fibre plant. At the time of the accident it was a dark morning and there were no lights whatever about the industry track. The switching operation consisted of two box cars which were being pushed by a Diesel locomotive in a northerly direction. Prior to the occurrence in question the engine and cars with a caboose attached had come north on defendant's main line. The caboose was left on the main line with the head brakeman protecting it. The switching movement then entered the Bell Fibre plant, and the yard conductor, Fietze, walked down the track ahead of the cars to the "entrance switch" where the track divides into a north track and an east track. When the switching movement passed Fietze onto the north track it was moving at three or four miles per hour, and decedent was riding on the east side of the lead car "in the place and manner that is customarily done." As the two cars and engine proceeded north they moved through a thirty-foot "tunnel" made by the sides and overhang of the adjoining building. The

accident occurred about fifteen feet north of the north end of the tunnel. At that time Fietze was standing east of the engine, about eighty feet from the front end of the lead car, so that he could pass signals with his lantern to the engineer to stop or proceed when he got a signal from the decedent. Fietze testified, "I did not see what happened. What attracted my attention to the happening of something is that I seen a shadow, a shadow was going against the wall. * * * There are no lights of any kind lighted at or about the sidetrack or that tunnel and when I saw the shadow appear to be going towards the wall I heard nothing. I yelled at the engineer to stop. When I yelled he stopped promptly. I can't say how far the engine went from the time I yelled until it did come to a stop. I don't recall. It went about 3 feet, 4 feet, something like that."

It is undisputed that the derailment was caused by a "dolly" which was used by the Bell Fibre Company to convey material about its plant on the railway tracks. This dolly was seven or eight feet in length and was constructed of metal angle irons. It extended ten or twelve inches above the track level and had no lights or any warning devices on it. One of defendant's rules provides: "Track foremen report to and receive instructions from the road master. They will be held responsible for the proper and economical maintenance of the track roadway and right of way on their sections and the use of labor and material furnished them. They must make frequent inspections of the section assigned to them, and know that it is in safe and proper condition." Defendant's section foreman, whose duty it was, under the above rule, to inspect and maintain the industry tracks, testified that he had seen this dolly in use on or about the industry tracks for two or three years prior to the accident, that he had never notified the industry not to use it; that he knew it had no lights or warning devices; that he never notified his superior officer that it was being used; and that he never told decedent that it was being used.

Under the agreement with the industry the defendant was required to maintain the industry tracks. The section foreman testified that he made weekly inspections of the tracks by walking over the track in the daytime, looking for objects that would foul the track. No inspection of the track was made prior to the switching operation on the night of the accident. There was no evidence as to when the dolly was placed on the track or how long it remained there prior to the accident.

Plaintiff's complaint charged defendant with the following four acts of negligence: (1) Defendant caused or allowed said car to become derailed; (2) defendant moved said car at a dangerous and excessive rate of speed; (3) defendant caused or allowed obstructions to be on the track; (4) defendant failed to furnish plaintiff's intestate with a reasonably safe place to work.

After a careful examination of the evidence, we are of the opinion that the record contains sufficient evidence to establish a reasonable basis from which the jury could conclude that defendant was guilty of the negligence charged and that such negligence contributed in whole or in part to decedent's death. Numerous rulings of the Federal courts have made it clear that to the maximum extent proper, questions in actions arising under the Federal Employer's Liability Act should be left to the jury. (*Tiller* v. *Atlantic Coast Line Railroad Co.* 318 U.S. 54, 68; *Bailey* v. *Central Vermont Railway,* 319 U.S. 350; *Tennant* v. *Peoria and Pekin Union Railway Co.* 321 U.S. 29.) In recent Illinois cases we have pointed out that "the right to trial by jury is a part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act. [Citation.] To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a good portion of the relief which Congress has afforded them." (*Williams* v. *New York Central Railroad Co.* 402 Ill. 494, 507. Even more recently, in *Bonnier* v. *Chicago, Burlington and Quincy Railroad Co.* 2 Ill. 2d 606, we again reiterated that only where there is a complete

absence of probative facts tending to show negligence should the court take the question from the jury and decide the issue of negligence as a matter of law.

In its opinion the Appellate Court stated that "it would be a burden not compatible with the practical operation of the railroad to require that each switching movement be preceded by a track walker. The most that could be required in the exercise of ordinary care, taking into consideration practical operation of the railroad, is that an inspection be made at reasonable times and places, the frequency depending upon varying circumstances." This typifies the sort of error into which we feel the Appellate Court has fallen in this case. The question of reasonableness was one for the jury and the reviewing court should not have substituted its judgment as to what was reasonable care for the conclusion of the jury on that issue. Likewise, the question of whether defendant was negligent in not taking additional measures to furnish its employees with a safe place to work was a question of fact for the jury. The Appellate Court had no right to hold, as a matter of law, that defendant was under no duty to inspect before this switching operation was commenced. The jury was properly entitled to find, as it apparently did, that it was negligent for defendant to conduct the switching operation in question in an unlighted yard without first inspecting to ascertain whether the track was clear of dangerous obstacles. In *Williams* v. *Atlantic Coast Line Railroad Co.* (5th Cir.) 190 Fed. 2d 744, the court said: "The employer must make proper tests and inspections to discover dangers in the place where the employees must work, and after ascertaining their existence must take reasonable precautions for the safety of the employees." Whether defendant made proper tests and inspections in the instant case was a proper question for submission to the jury and thus it was error for the Appellate Court to reverse the verdict and judgment in favor of plaintiff.

For the foregoing reasons the judgment of the Appellate Court is hereby reversed, and the cause is remanded to that court to consider the other assignments of error which it stated were not considered upon the initial review of the case.

Reversed and remanded.